EVIdENCE MEMOrANdUM

EXHIBIT

A

APEllANT's

Petition for REVIEW

SUPREME COURT NO. ______________

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	) Court of Appeal
	) No. D046320
v.	)
	)
JAMES H. CUNNINGHAM,	) Super. Ct. No.
	) SCE243538
Defendant and Appellant.	)
	)
____________________________________	)

APPELLANT'S PETITION FOR REVIEW

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Plaintiff and Respondent,	)	Court of Appeal
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Defendant and Appellant.	)	
	)	
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APPELLANT'S PETITION FOR REVIEW

PETITION OF APPELLANT FOR REVIEW AFTER THE UNPUBLISHED DECISION BY THE COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT, DIVISION ONE, IN CASE NUMBER D046320, AFFIRMING THE JUDGMENT OF THE SUPERIOR COURT OF SAN DIEGO COUNTY.

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner James H. Cunningham respectfully petitions this Court for review from the unpublished decision of the Court of Appeal, Fourth Appellate District, Division One, in Appeal No. D046320, affirming the judgment of the San Diego County Superior Court in Superior Court Case No. SCE243538.

STATEMENT OF THE CASE

An information filed on September 15, 2004, charged appellant with four counts. Count 1 charged appellant with first degree burglary of an inhabited dwelling in violation of Penal Code sections 459 and 460. Count 2 charged appellant with assault with a firearm in violation of Penal Code section 245, subdivision (a)(2). Count 3 charged appellant with unlawfully possessing a firearm as a felon in violation of Penal Code section 12021, subdivision (a)(1). Count 4 charged appellant with unlawfully possessing a short-barreled shotgun in violation of Penal Code section 12020, subdivision (a)(1). As to Counts 1 and 2, the information alleged that appellant personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a). The information also alleged appellant had suffered a prior strike conviction and conviction of a serious felony within the meaning of Penal Code section 667, subdivisions (b) through (i), and subdivision (a), respectively.

On January 6, 2005, a jury found appellant not guilty of Count 1, and found him guilty of Counts 2 through 4. Appellant waived a jury for trial on the prior allegations. (R.T. p. 335.) On January 10, 2005, appellant admitted the prior strike and prior serious felony allegations. (R.T. p. 411.)

On March 9, 2005, the court declined to dismiss appellant's strike, and imposed the low term of two years on Count 2, doubled to four years based on appellant's strike, plus a concurrent low term of 16 months, doubled to 32 months on Count 3, plus a low term on Count 4, which the court stayed pursuant to Penal Code section 654. The court additionally imposed a low term, three-year enhancement for the firearm allegation, plus a five-year enhancement for the serious felony prior, for a total prison term of 12 years. The court imposed a restitution fine of $1,000 pursuant to Penal Code section 1202.4, and imposed but stayed a parole revocation fine of $1,000 pursuant to Penal Code section 1202.45. (R.T. pp. 462-463; C.T. pp. 93-94.)

On April 22, 2005, appellant timely filed a notice of appeal. (C.T. p. 95.)

On March 9, 2006, the Court of Appeal affirmed the judgment without modification. (Attachment A.)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. WHETHER THE TRIAL COURT ERRED BY DENYING PETITIONER'S REQUEST TO CROSS-EXAMINE REBECCA KNOX

REGARDING HER PRIOR DOMESTIC VIOLENCE ACCUSATIONS AGAINST HER HUSBAND, CHRISTOPHER KNOX, WHICH SHE LATER RECANTED, AND THEREBY VIOLATED PETITIONER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND TO CROSS-EXAMINE WITNESSES AGAINST HIM.

2. WHETHER THE COURT ERRED BY DENYING THE DEFENSE REQUEST TO INSTRUCT WITH CALJIC NUMBER 12.50 WHEN THE EVIDENCE WARRANTED SUCH INSTRUCTION, AND THE FAILURE TO INSTRUCT IMPERMISSIBLY REDUCED THE PROSECUTION'S BURDEN OF PROOF AND VIOLATED PETITIONER'S DUE PROCESS AND TRIAL RIGHTS.

3. WHETHER THE TRIAL COURT ERRED IN GIVING CALJIC NUMBER 2.52, THE STATUTORY FLIGHT INSTRUCTION, OVER DEFENSE OBJECTION THEREBY VIOLATING PETITIONER'S DUE PROCESS RIGHTS.

NECESSITY FOR REVIEW

Review of this case is proper to settle important issues of law within the meaning of California Rule of Court 28, subdivision (b).

The first issue involves the court's excluding impeachment evidence against one of the prosecution's two important witnesses. The evidence was that the witness had within the last few years[1] made official charges of criminal conduct, then later recanted them. The trial court excluded the evidence as too time consuming. (RT p. 13.) The Court of Appeal concluded the evidence was only marginally relevant. (Attachment A, pp. 11, 12.) The problem with that conclusion is twofold. First, the trial court concluded the evidence was relevant, not marginally relevant, but excluded it as too time-consuming to present. Second, it was the jury's place to assess witness credibility. To analyze the proffered evidence in hindsight is a formidable task, particularly here where the only other percipient witness was one who suffered from mental illness that caused him to hallucinate events similar to the ones charged. A witness' previous behavior that involved lying about criminal conduct also revealed a lack of respect for the criminal justice system, and was relevant impeachment. Despite the fact that the jury acquitted petitioner on one count, and the prosecution's other witness suffered from a mental disorder affecting his ability to perceive and recall, the Court of Appeal concluded "a reasonable jury would not have received a significantly different impression" of the witness if it had heard

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1 The Court of Appeal opinion described the time frame as "several years earlier." (Attachment A, p. 8.) The incidents giving rise to the charges occurred on September 12, 2004. (RT p. 28.) The proffer relating to the impeachment evidence was that the witness made the accusations of criminal conduct, that she later recanted, in 2001. (See Attachment A, p. 9, quoting defense counsel.)

the evidence. (Attachment A, p. 16.) Petitioner disagrees. First, petitioner was entitled to a jury determination of the witness' credibility, not the appellate court's determination. Second, the so-called corroboration of the witness was sufficiently suspect that it cannot be concluded the impeachment would have made no difference to the jury.

The second issue involves the trial court's denial of petitioner's request for an instruction that he had not violated Penal Code section 12021 if the jury found he possessed the firearm for self-defense. In People v. King (1978) 22 Cal.3d 12, this Court rejected the rule that a felon may not lawfully possess a firearm under any circumstances, including when exercising a right to self-defense. (Id. at p. 24.) King concluded the Legislature did not intend to preclude a felon from asserting self-defense, and other related defenses, such as defense of habitation. (Id. at pp. 21-24.) In the years following the King decision, lower appellate courts have struggled, with inconsistent results, to apply King. (See e.g., People v. McClindon (1980) 114 Cal.App.3d 336 [rejecting defendant's argument he was entitled to self-defense instruction for felon in possession of a firearm charge] and People v. Mischele (1983) 142 Cal.App.3d 686 [reversing convictions for second degree murder and possessing a concealed weapon as a felon, holding trial court erred by failing to give self-defense instructions].) While this category of self-defense issue is inherently fact specific, clearer guidance is needed for lower courts as to when self defense instructions, such as former CALJIC Number 12.50 are appropriate or required.

Additionally, review of these issues are necessary because petitioner was deprived of his constitutional rights and petitioner must exhaust his potential state remedies before seeking federal habeas relief. (O'Sullivan v. Boerckel (1999) 526 U.S. 838 [119 S.Ct. 1728, 144 L.Ed.2d 1].)

STATEMENT OF FACTS

With the following additional facts, petitioner otherwise adopts the statement of facts as set forth by the Court of Appeal in its opinion. (Attachment A, pp. 3-7.) The victim of the assault in count two testified his memory of the timing of events was "fuzzy" because of his medication. (RT p. 48.) He suffered from a mental disorder that caused him to hear things, hear yelling and believe people were coming to kill him. (RT pp. 48, 50.) This mental disorder caused him to hallucinate events exactly like the ones he attributed to petitioner. (RT p. 50.) In his defense case, petitioner testified there was a lot of gang activity in the neighborhood where he lived. (RT p. 231.) About six months before the incident, petitioner had been jumped at the apartment complex where he lived. He required 16 stitches to treat his injury. Thereafter, he obtained a shotgun for protection. (RT p. 222.) The apartment complex had armed security officers on patrol in the complex daily from 6:00 p.m. to 2:00 a.m. (RT p. 108.)

ARGUMENT

I

WHETHER THE TRIAL COURT ERRED BY DENYING PETITIONER'S REQUEST TO CROSS-EXAMINE REBECCA KNOX REGARDING HER PRIOR DOMESTIC VIOLENCE ACCUSATIONS AGAINST HER HUSBAND, CHRISTOPHER KNOX, WHICH SHE LATER RECANTED, AND THEREBY VIOLATED PETITIONER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND TO CROSS-EXAMINE WITNESSES AGAINST HIM.

Rebecca Knox was one of two percipient prosecution witnesses to testify. The other witness was the victim in count two who testified his memory of the timing of events was "fuzzy" because of his medication. (RT p. 48.) He suffered from a mental disorder that caused him to hear things, hear yelling and believe people were coming to kill him. (RT pp. 48, 50.) This mental disorder caused him to hallucinate events exactly like the ones he attributed to petitioner. (RT p. 50.) As such, Knox's credibility was critical[2] to the prosecution's case. The case was a classic credibility contest between Knox and the mentally disordered victim, on the one hand, and petitioner who testified, on the other hand.

The impeachment petitioner sought to introduce was that Knox made accusations of domestic violence against her husband, Chris Knox, then withdrew the accusations. (RT p. 12.) The trial court erred by excluding the evidence and thereby violated appellant's federal constitutional rights to present a defense and to confront and cross-examine the witnesses against him. (Chambers v. Mississippi (1973) 410 U.S. 284, 302 [35 L.Ed.2d 297, 93 S.Ct. 1038]; In re Martin (1987) 44 Cal.3d 1, 29; People v. Reynolds (1984) 152 Cal.App.3d 42, 45.)

The fact that victims of domestic violence often recant accusations did not provide a ground for denying petitioner the opportunity to impeach Knox. (Contra, Attachment A, p. 11.) This incident of lying – either in making the criminal accusations in the first place, or in later denying them – shed light not only on Knox's credibility, but also the small importance she placed on providing statements to law enforcement and prosecution

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2 The Court of Appeal described Knox's testimony as "important to the People's case," but concluded the victim's testimony corroborated Knox and lessened the importance of her testimony. (Attachment A, p. 12.) In view of the objectively obvious deficiencies in the victim's testimony, that is, his mental disorder and hallucinations, petitioner disagrees.

authorities. Moreover, that petitioner cross-examined Knox on other matters relating to her credibility did not dilute the error. (Contra, Attachment A, p. 12.) *Some* cross-examination was not the same as *full* cross-examination that included impeachment evidence. It was not a foregone conclusion that petitioner's jury would have found the impeachment evidence as unpersuasive as the Court of Appeal. Petitioner was entitled to have his jury, a neutral arbiter, assess witness credibility, then make factual findings.

The trial court acknowledged the impeachment evidence was relevant (RT p. 13), but excluded it, ruling "the time it will take to bring it in," and "the trial within a trial that it will most certainly would require." (Ibid.) The trial court did not characterize the evidence as merely "marginal" as did the Court of Appeal. (Attachment A, pp. 11, 12.) Instead, the trial court's focus was on the time-consuming nature of the evidence. That aspect, however, was a red herring. The impeachment involved a very straightforward matter that could have been introduced in a few questions on cross-examination.[3] Likewise, the prosecution could have easily attempted to rehabilitate Knox through a few, simple questions.

Finally, the Court of Appeal incorrectly characterized the proffered impeachment as "a minor point," citing this Court's opinion in People v. Boyette (2002) 29 Cal.4th 381. (Attachment A, pp. 16-17.) A review of Boyette, however, reveals the vast difference between the minor nature of the excluded evidence in Boyette as contrasted with the excluded impeachment evidence against a key witness in the instant case. In Boyette, a capital case, the defendant was convicted of the first degree murders of two victims, and special circumstances of multiple murders and use of a firearm were found true. (Id. at p. 403.) Boyette lived with a drug dealer in Oakland, from whom one of the murder victims allegedly stole $3,500 worth of rock cocaine and $1,000 cash. (Ibid.) The drug dealer and Boyette tracked the murder victim. The drug dealer confronted the victim, demanding his property while firing a handgun. (Id. at p. 404.) Boyette

3 Federal standards make clear that no "trial within a trial" was necessary. Petitioner was not required to call other witnesses, but could impeach Knox by questioning her. Impeachment requires only a good faith basis to ask the impeachment question, but does not require the cross-examiner either to call or to be prepared to call witnesses. (United States v. Davenport (9th Cir. 1985) 753 F.2d 1460, 1463; United States v. Ruiz-Castro (10th Cir. 1996) 92 F.3d 1519, 1529; United States v. Lamarr (4th Cir. 1995) 75 F.3d 964, 971; Oostendorp v. Trilok S. Khanna, Janesviell Medical Center (7th Cir. 1991) 937 F.2d 1177, citing United States v. Elizondo (7th Cir. 1990) 920 F.2d 1308, 1313.)

grabbed the gun from the drug dealer and followed the victim, who was then being dragged away by his girlfriend. Boyette shot the girlfriend twice in the face. Several more shots were fired and Boyette was seen standing over the second victim's body. (Ibid.) A few days later, Boyette warned a witness he had better not say anything about the murders. (Id. at p. 405.) After waiving his rights, Boyette admitted he was present at the time of the shootings, that he fired a single shot at one of the victims, the saw two others kill the two victims.

At trial, Boyette sought to introduce evidence of arguments and threats by "Dee," the man he claimed was the shooter. The threats were supposedly made to a third person. The trial court, and this Court, concluded the threats had no tendency to prove whether "Dee" ever threatened Boyette, and constituted only a "minor" point. (Id. at p. 428.) Boyette also attempted to introduce hearsay that his mother was overheard saying she was afraid of the drug dealer. The proffered relevance would support an inference that Boyette's claim he and his family had been threatened, and those threats were the reason for the changes in his version of what happened. (Id. at p. 428.) This Court concluded the hearsay evidence was properly excluded, and noted that Boyette had failed to ask his mother, when she was on the stand, whether she had feared for her safety. (Ibid.)

What the foregoing discussion demonstrates is evidence that was truly "marginal" to the proof of any disputed fact of consequence. (Evid. Code, § 210.) In contrast, Knox's honesty was a factor the jury was entitled to consider in determining her credibility. The constitutional guarantee of "'a meaningful opportunity to present a complete defense'" is grounded in the due process clause of the Fourteenth Amendment and the compulsory process or confrontation clauses of the Sixth Amendment. (Crane v. Kentucky (1986) 476 U.S. 683, 690 [90 L.Ed.2d 636, 106 S.Ct. 2142]; In re Martin, supra, 44 Cal.3d at p. 29.) This right includes the right to impeach witnesses at trial. (Chambers v. Mississippi, supra, 410 U.S. at pp. 295-298, 302; Olden v. Kentucky (1988) 488 U.S. 227, 231 [102 L.Ed.2d 513, 109 S.Ct. 480]; United States v. Abel (1984) 469 U.S. 45, 50 [83 L.Ed.2d 450, 105 S.Ct. 465].)

The Sixth Amendment right of confrontation imposes limitations on the trial court's ability to restrict the scope of cross-examination of prosecution witnesses. The law is well established that a defendant has a right under the Sixth Amendment Confrontation Clause to admit evidence showing a motive to make false accusations. (Delaware v. Van Arsdall

(1986) 475 U.S. 673, 680-681 [106 S.Ct. 1431, 1435-1436, 89 L.Ed.2d 674] [restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment confrontation clause].)

The Confrontation Clause guarantees the defendant in a criminal prosecution the right of cross-examination, which includes exploration of bias and motive to accuse falsely. (Davis v. Alaska (1974) 415 U.S. 308, 315-316 [94 S.Ct. 1105, 39 L.Ed.2d 347].) A defendant's right to present his theory is a fundamental right, and all of his pertinent evidence should be considered by the trier of fact. (Id., at p. 317.) Evidence Code section 352 must "bow to the due process right of a defendant to present all relevant evidence of significant probative value to his defense." (People v. Reeder (1978) 82 Cal.App.3d 543, 553.) While the admission of evidence pursuant to section 352 is within the discretion of the trial court, "the exercise of such discretion 'should favor the defendant in cases of doubt'" (People v. Burrell-Hart (1987) 192 Cal.App.3d 593, 600.)

The general rule is that this type of error requires reversal if it can be said a result more favorable to appellant would have been obtained absent the error, which is the standard the Court of Appeal appeared to apply. (See e.g., People v. Watson (1956) 46 Cal.2d 818, 836; People v. Daggett (1990)

225 Cal.App.3d 751, 758; see also Attachment A, p. 13[4].) Because the trial court's exclusion of the above evidence denied appellant his right of confrontation, the judgment of guilt should be reversed unless the error was harmless beyond a reasonable doubt. (Delaware v. Van Arsdall, supra, 475 U.S. at p. 680.)

A number of factors weigh in the determination of whether this type of error is harmless. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (Id. at p. 684; see also People v. Rodriguez (1986) 42 Cal.3d 730, 750-751.) Petitioner submits that each of these factors demonstrates the error was prejudicial. This was a close case. First, the jury acquitted appellant on Count 1. (People v. Washington (1958) 163 Cal.App.2d 833, 846 [close case when jury refuses to convict on all counts]; contra Attachment A, p. 13 [concluding that acquittal on count one did not reflect either closeness or adversely on the jury's view of Knox].) Second,

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4 The Court of Appeal applied Watson to the Evidence section 352 portion of the argument, and appeared to apply the same standard when rejecting petitioner's federal constitutional claims. (See generally, Attachment A, p. 11.)

resolution turned on the credibility of witnesses and this error tended to bolster a crucial prosecution witnesses. (People v. Briggs (1962) 58 Cal.2d 385, 404; People v. Taylor (1986) 180 Cal.App.3d 622, 626; United States v. Simtob (9th Cir. 1990) 901 F.2d 799, 806.) Third, conflicting inferences could have been drawn from the evidence. (People v. Weatherford (1945) 27 Cal.2d 401, 403.)

Only two percipient witnesses testified for the prosecution: Knox and the assault victim. Any reasonable jury could have rejected the victim's testimony. His memory was "fuzzy" because of his medication. (RT p. 48.) He had a mental disorder that caused him to hallucinate yelling, and to think people were coming to kill him. (RT pp. 48, 50.) His mental disorder caused him to hallucinate events just like the ones he accused petitioner of. (RT p. 50.) The Court of Appeal explained why a jury could have nonetheless found the victim credible, but there is no way to know whether the jury did, or whether the jury relied on Knox to convict. The entire record supports the conclusion that it was Knox's testimony that carried the day for the prosecution. The victim's testimony was objectively suspect due to his illness and medication. Thus, the case pitted the appellant's credibility against Knox's credibility. In this situation, the rule is that *any* substantial error that tends to bolster or corroborate the prosecution case must be deemed prejudicial on review. (Cf., People v. Babbitt (1988) 45 Cal.3d 660, 689; In re Martin (1987) 44 Cal.3d 1, 51; People v. Bain (1971) 5 Cal.3d 839, 852.)

Based on the foregoing, the exclusion of the defense impeachment evidence was prejudicial and the convictions should have been reversed.

II

WHETHER THE COURT ERRED BY DENYING THE DEFENSE REQUEST TO INSTRUCT WITH CALJIC NUMBER 12.50 WHEN THE EVIDENCE WARRANTED SUCH INSTRUCTION, AND THE FAILURE TO INSTRUCT IMPERMISSIBLY REDUCED THE PROSECUTION'S BURDEN OF PROOF AND VIOLATED PETITIONER'S DUE PROCESS AND TRIAL RIGHTS.

The defense requested the court to instruct the jury with CALJIC Number 12.50, but the court denied the request and thereby committed reversible error. Appellant presented evidence that he possessed the short-barreled shotgun for self defense in three situations. He had been attacked six months before the charged offenses (RT p. 222); there was a lot of gang activity in his neighborhood (RT p. 231); and appellant received specific threats from Chris Knox who had both threatened his life on multiple occasions and threatened petitioner with a baseball bat. (See e.g., RT p. 40; see also Attachment A, p. 6.) The evidence showed the need for protection in the area: the apartment complex had armed security officers on patrol in the complex daily from 6:00 p.m. to 2:00 a.m. (RT p. 108.) Appellant had a "constitutional right to have the jury determine every material issue presented by the evidence." (People v. Geiger (1984) 35 Cal.3d 510, 519.) The court's failure to give the requested instruction deprived appellant of his constitutionally protected rights to due process right and to a jury trial.

(U.S. Const., Sixth and Fourteenth Amendments; Cal. Const., art. 1, §15.) The error required reversal on count three.

The law recognizes that a felon does not violate Penal Code section 12021 if the possession of the firearm is for self-defense. CALJIC Number 12.50 is the pattern jury instruction summarizing the law, and was requested by the defense. (RT pp. 279-280.) It provides:

> A person previously convicted of a felony does not violate § 12021 of the Penal Code by being in possession of a firearm if:
>
> 1. [He] [She] as a reasonable person had grounds for believing and did believe that [he] [she] was [or] [others were] in imminent peril of great bodily harm; and
>
> 2. Without preconceived design on [his] [her] part, a firearm was made available to [him] [her];
>
> 3. [His] [Her] possession of such firearm was temporary and for a period of time no longer than that in which the necessity or apparent necessity to use it in self-defense continued; and
>
> 4. The use of the firearm was reasonable under the circumstances and was resorted to only if no alternative means of avoiding danger were available.

(CALJIC No. 12.50.)

California joins several sister jurisdictions in concluding that a felon may raise the defense that possession of a weapon, otherwise prohibited, was for self-defense. (See e.g., Taylor v. State (1993) 636 So. 2d 1246 [Alabama]; Marrero v. State (1987) 516 So.2d 1052 [Florida]; Duvall c. Commonwealth (1979) 593 SW2d 884 [Kentucky]; Commonwealth v. McCambridge (1998) 44 Mass.App.Ct. 285 [Massachusetts]; State v. Spaulding (1980) 296 NW2d 870 [Minnesota]; Osborne v. State (1981) 404 So.2d 545 [Mississippi]; State v. Hardy (1978) 60 Ohio App.2d 325 [Ohio].)

California law is that a felon is not deprived of the right to self-defense, including self-defense with a firearm, notwithstanding the plain language of Penal Code section 12021. In People v. King, supra, 22 Cal.3d 12, this Court rejected the holding in People v. Evans (1974) 40 Cal.App.3d 582, to the extent it was interpreted to mean that a felon may not lawfully possess a firearm under any circumstances, including when exercising a right to self-defense. (Id. at p. 24.) King concluded the Legislature did not intend to preclude a felon from asserting self-defense, and other related defenses, such as defense of habitation. (Id. at pp. 21-24.) The defendant in King was a guest at a party when a violent altercation arose with a group of party crashers. (Id. at pp. 17-18.) As people were pounding on the door and threatening to break down the door, defendant was handed a pistol, which he fired to frighten the would-be intruders. (Id. at pp. 18-19.) The

Court concluded that a felon's use of a firearm for self-defense was not proscribed by section 12021. (Id. at p. 25.) After King was decided, the Courts of Appeal have reached conflicting results in its application.

For example, in People v. Mischele, supra, 142 Cal.App.3d 686, the First Appellate District, Division One, reversed the defendant's convictions for second degree murder and possessing a concealable weapon as a felon. The defendant and his wife had been arguing. Mischele knew his wife's tendency toward violence and knew she had a gun in her jacket pocket. He picked up the jacket and removed the gun. Mischele claimed the gun accidentally discharged and the shot killed his wife. (Id. at pp. 688-690.) The Mischele decision found the trial court erred by failing to give appropriate instructions regarding possible self-defense as explained in People v. King, supra. (Mischele, supra, 142 Cal.App.3d at p. 692.)

In contrast, in People v. McClindon, supra, 114 Cal.App.3d 336, the Second Appellate District, Division Five, held there was no foundation in evidence requiring instruction under King. In McClindon, the felon-defendant fired a pistol at two boys who were playing ball in the courtyard of defendant's apartment building and disturbed his sleep. (Id. at pp. 338-339.) The McClindon decision rejected self-defense under the facts, and also noted that the defendant had possessed the firearm for five months.

McClindon underscores the need for further guidance from this Court. While petitioner possessed the firearms for a longer period than the defendant in McClindon (six versus five months), petitioner also presented evidence he needed protection. Whereas in McClindon there was absolutely no evidence that the defendant was in need of self-defense. There, young boys, aged seven and 10 years, respectively, were playing with a ball at 8:30 p.m. (Id. at p. 339.) In McClindon, the defendant kept the loaded gun on his night stand. (Ibid.) In contrast, petitioner had his under lock and put away in a closet. (RT pp. 228-230.)

The evidence in petitioner's case was sufficient to warrant instruction on self-defense. There was evidence from both petitioner and prosecution witnesses that Chris Knox had threatened appellant's life, and did so while armed with a deadly weapon, a bat. The 911 tape itself also established that Rebecca Knox threatened to shoot appellant in the face. (CT p. 9.) That situation in appellant's environment created a peril against which he was permitted to defend himself. While the threats against appellant's life did not present the immediacy of the threats in People v. King or People v. Mischele, both supra, the threats were no less imminent. Substantial evidence showed that on an ongoing basis appellant was in "imminent peril." Not only was in peril from his neighbor, but also he was in peril, and indeed already had been attacked due to the bad neighborhood where he lived. There were gangs in the area and he had suffered an attack requiring 16 stitches.

Petitioner's six-month long possession did not equate to a "preconceived design." (See CALJIC No. 12.50.) The term "preconceived design" is undefined in California law. But the fact that appellant *correctly* anticipated a specific emergency situation did not make his possession part of a preconceived design. The question of whether appellant possessed the firearm(s) for self-defense was a question of fact for the jury, not the judge. (People v. Lemus (1988) 203 Cal.App.3d 470, 475.)

Finally, Penal Code sections 12025 and 12031 are instructive to this analysis. Those sections permit a person to carry a concealed or loaded firearm when the person reasonably believes that he or she is in "grave danger." (Pen. Code, §§ 12025, 12031, subd. (j).) While "grave danger" is not defined, it is a different standard from the "imminent peril of death or great bodily injury" standard set forth in self-defense sections. (Compare, Pen. Code, §§ 198.5, 197.) Because the Legislature did not use the standard self-defense language in explaining when weapons possession for self-defense is authorized, it is reasonable to conclude the Legislature intended a different standard. (Bunner v. Imperial Insurance Co. (1986) 181

Cal.App.3d 14, 22.) Thus, it is reasonable to conclude that "grave danger" includes less imminent perils and non-life threatening ones. By analogy, exceptions to the felon in possession statute also should include this type of self-defense.

In sum, appellant was entitled to a jury determination of whether his possession of the firearms was for self-defense. This is the type of issue where a reviewing court should not try to weigh the evidence relating to the omitted defense theory because it is the jury, not a trial or reviewing court, that should make the determination. (See Carella v. California (1989) 491 U.S. 263 [109 S.Ct. 2419, 105 L.Ed.2d 218], Scalia, J., conc.) Accordingly, the error is not susceptible to harmless error review, and the conviction on count three should have bene reversed.

III

WHETHER THE TRIAL COURT ERRED IN GIVING CALJIC NUMBER 2.52, THE STATUTORY FLIGHT INSTRUCTION, OVER DEFENSE OBJECTION THEREBY VIOLATING PETITIONER'S DUE PROCESS RIGHTS.

It was error to instruct, over defense objection, with CALJIC number 2.52. Substantial evidence demonstrated that appellant's departure had nothing to do with a consciousness of guilt to the charged offenses. Appellant's life was being threatened by Chris Knox, who was armed with a baseball bat. The 911 tape also revealed that Rebecca Knox threatened to shoot appellant in the face. (CT p. 9 ["I'm gonna shoot you in your face, you come up here again"]. [5]) Thus, appellant's departure did not support the consciousness of guilt inference permitted by the instruction. The instruction impermissibly diluted the prosecution's burden of proving the truth of the charges beyond a reasonable doubt, violated due process, and required reversal of appellant's convictions.

Penal Code section 1127c makes giving a flight instruction mandatory "where evidence of flight is relied upon as tending to show guilt." The section provides:

> In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows:
>
> The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

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5 The 911 tape, which was played to the jury, and for which they had a transcript (RT pp. 76-77), recorded Rebecca Knox arguing with petitioner and stating, "Yep. You gonna let me have it tonight. I'm gonna shoot you in your face, you come up here again." (CT p. 9.)

> No further instruction on the subject need be given.

(Pen. Code, § 1127c [emphasis added].)

Penal Code section 1127c contains two limitations to its application. First, the section requires a flight instruction only "where the evidence of flight is relied upon as tending to show guilt, ..." Second, even when a flight instruction is required, the trial court does not necessarily have to instruct using the wording set forth in section 1127c. Both limitations applied in the instant case. First, there was no evidence that appellant fled in a manner showing consciousness of guilt within the meaning of Penal Code section 1127c. Thus, the flight instruction was improper. Second, even if the instruction was appropriate, the pattern instruction based on section 1127c required modification in appellant's case.

The flight instruction should be given with caution. As the Court of Appeals for the Fifth Circuit noted:

> Analytically, flight is an admission by conduct. E. Cleary McCormick on Evidence § 271, p. 655 (rev. ed. 1972). Its probative value as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual

> guilt of the crime charged. See generally Miller v. United States, 116 U.S.App.D.C. 45, 320 F.2d 767, 770 (1963); 1 J. Wigmore, Evidence § 173, p. 632 (3d ed. 1940). The use of evidence of flight has been criticized on the grounds that the second and fourth inferences are not supported by common experience and it is widely acknowledged that evidence of flight or related conduct is "only marginally probative as to the ultimate issue of guilt or innocence."

(United States v. Myers (5th Cir. 1977) 550 F.2d 1036, 1049, citing United States v. Robinson (1973) 475 F.2d 376, 384; Wong Sun v. United States (1963) 371 U.S. 471, 483-484, fn. 10, [83 S. Ct. 407, 415-416, 9 L. Ed. 2d 441, 452-453]; United States v. Craig (6th Cir. 1975) 522 F.2d 29, 30.)

The Court of Appeals for the Ninth Circuit recently explained that a flight instruction is improper unless the evidence supports each of the four separate inferences: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. (United States v. Reneblanco (9th Cir. 2004) 392 F.3d 382, 395, citing United States v. Silverman (9th Cir. 1988) 861 F.2d 571, 581.) In Reneblanco, the Court also considered the defendant's *lack of flight or evasion* when confronted by law enforcement agents. (Reneblanco, supra, 392 F.3d at p. 396.) Here, appellant also immediately submitted to law enforcement authority and cooperated fully when he was stopped. (R.T. pp. 159, 164.) Evidence supported an inference that appellant left for several reasons, including that his life was being threatened. Where, as here, there was no evidence of actual *flight*, giving of CALJIC No. 2.52 was error. There simply was no substantial evidence to support each of the four inferences prerequisite to giving the flight instruction. (United States v. Reneblanco, supra, 392 F.3d at p. 395.)

Even if *some* flight instruction was appropriate, the pattern instruction required modification in this case. (See e.g., People v. London (1988) 206 Cal.App.3d 896, 904.) Here, because substantial evidence showed an innocent reason for appellant's departure, the court should have modified the pattern instruction, and also instructed the jury it had to make preliminary factual findings before it could infer any consciousness of guilt from appellant's departure. When there is evidence that suggests a reason for flight other than consciousness of guilt, then the court should instruct the jury more specifically that whether or not the evidence shows a consciousness of guilt, and what significance to attach to it, are questions of fact the jury must determine. (People v. Gutierrez (1993) 14 Cal.App.4th 380, 388.)

Additionally, the jury should have be instructed to make preliminary fact-finding before considering flight as consciousness of guilt. Under Crandell, supra, in order to indicate a consciousness of guilt, appellant's reason for leaving had to have been to avoid observation or arrest. For example, the "[m]ere return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt." (People v. Turner (1990) 50 Cal.3d 668, 695.) Whenever this preliminary fact is in question, the defendant has a right to an instruction requiring the jury to determine whether the preliminary fact necessary to establish the relevance of the evidence exists and to disregard the evidence unless the jury finds that the preliminary fact does exist. (Evid. Code, § 403, subd. (c)(1).)

If the jury is permitted to find a consciousness of guilt without making the requisite preliminary factual findings, the prosecution's burden is lessened and there is a danger of jury reliance upon an irrational or unjustified inference in violation of the defendant's Sixth and Fourteenth Amendment rights. Here, a preliminary fact-finding was very important because the jury received evidence appellant's life had been threatened by both Chris and Rebecca Knox. While appellant stated on cross-examination that he left to avoid arrest (R.T. pp. 207-208), there also was substantial, unrefuted evidence showing he left for innocent (safety) reasons. Moreover, to the extent the jury could have inferred from the evidence that appellant left to "cool down"(R.T. p. 219), just as he left the Knoxes' apartment, then his departure was innocent, and indeed should be encouraged by the law, and certainly carried with it no consciousness of guilt.

Under either the Chapman[6] or Watson, supra, standards of review, appellant was prejudiced by the statutory flight instruction. The permissible inference of the instruction improperly undermined appellant's presumption of innocence. Appellant's leaving the scene where his life had been threatened by a yelling man armed with a baseball bat, and a yelling woman who threatened to shoot appellant in the face, did not support an inference of guilt. Moreover, the instruction directed the jury's attention to flight. Even though the instruction was permissive, the instruction suggested that flight was one type of evidence of guilt that could "establish guilt."

Based on the foregoing, appellant's convictions on all counts should have been reversed.

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6 Chapman v. California (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].

CONCLUSION

For the reasons above, review should be granted of the above issues.

DATED: April 3, 2006

Susan K. Keiser
Attorney for Petitioner,
James H. Cunninham

c:\...\2004cases\cunningham.pfr

CERTIFICATE OF APPELLATE COUNSEL
PURSUANT TO RULE 28.1(D), CALIFORNIA RULES OF COURT

I, SUSAN K. KEISER, appointed counsel for James H. Cunningham, hereby certify, pursuant to Rule 28.1(d), California Rules of Court, that I prepared the foregoing Petition for Review on behalf of my client. I calculated the word count for the petition in the word-processing program Corel WordPerfect 12. The word count for the petition is 6,498, including footnotes, but not including the cover, tables or attachments. The petition therefore complies with the rule, which limits the word count to 8,400. I certify that I prepared this brief in the word-processing program Corel WordPerfect 12 and this is the word count WordPerfect generated for this petition.

Dated: April 3, 2006

SUSAN K. KEISER

Attachment B

Petition for writ of Habeas Corpus
Evidence Memorandum

EXHIBIT

B

APPELLANT'S OPENING BRIEF

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	) Court of Appeal
	) No. D046320
v.	)
	) Superior Court
JAMES H. CUNNINGHAM,	) No. SCE243538
	)
Defendant and Appellant.	)
	)
	)

Appeal from the Superior Court of the State of California In and For the County of San Diego

Honorable William J. McGrath, Judge

APPELLANT'S OPENING BRIEF

STATEMENT OF APPELLATE JURISDICTION

This appeal is from a judgment that finally disposes of all issues between the parties and is authorized by Penal Code section 1237.

STATEMENT OF THE CASE

An information filed on September 15, 2004, charged appellant with four counts. Count 1 charged appellant with first degree burglary of an inhabited dwelling in violation of Penal Code sections 459 and 460. Count 2 charged appellant with assault with a firearm in violation of Penal Code section 245, subdivision (a)(2). Count 3 charged appellant with unlawfully possessing a firearm as a felon in violation of Penal Code section 12021, subdivision (a)(1). Count 4 charged appellant with unlawfully possessing a short-barreled shotgun in violation of Penal Code section 12020, subdivision (a)(1). As to Counts 1 and 2, the information alleged that appellant personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a). The information also alleged appellant had suffered a prior strike conviction and conviction of a serious felony within the meaning of Penal Code section 667, subdivisions (b) through (i), and subdivision (a), respectively.

On January 6, 2005, a jury found appellant not guilty of Count 1, and found him guilty of Counts 2 through 4. Appellant waived a jury for trial on the prior allegations. (R.T. p. 335.) On January 10, 2005, appellant admitted the prior strike and prior serious felony allegations. (R.T. p. 411.)

On March 9, 2005, the court declined to dismiss appellant's strike, and imposed the low term of two years on Count 2, doubled to four years based on appellant's strike, plus a concurrent low term of 16 months, doubled to 32 months on Count 3, plus a low term on Count 4, which the court stayed pursuant to Penal Code section 654. The court additionally imposed a low term, three-year enhancement for the firearm allegation, plus a five-year enhancement for the serious felony prior, for a total prison term of 12 years. The court imposed a restitution fine of $1,000 pursuant to Penal Code section 1202.4, and imposed but stayed a parole revocation fine of $1,000 pursuant to Penal Code section 1202.45. (R.T. pp. 462-463; C.T. pp. 93-94.)

On April 22, 2005, appellant timely filed a notice of appeal. (C.T. p. 95.)

STATEMENT OF FACTS[1]

A. Prosecution Evidence.

From June 2004 through August 2004, Jose Castro lived with Rebecca and Christopher Knox in their two bedroom apartment at the Bella Vista Apartments located at 545 North Mollison. (R.T. pp. 27-28.) During that time Castro heard lots of arguments between appellant and Christopher Knox. They yelled they would kill each other. (R.T. pp. 39-40.) Chris Knox had threatened to kill appellant ever since Castro moved in with the Knoxes. (R.T. p. 40.) The Knoxes' apartment was upstairs. (R.T. p. 27.) At the time of trial, the prosecution had paid for Castro's five-night stay in a hotel. (R.T. p. 36.)

On September 12, 2004, Castro was helping the Knoxes move because they had been evicted. (R.T. p. 28.) Appellant came to the apartment and yelled for his vacuum cleaner. (R.T. p. 28.) Castro told appellant that Rebecca Knox was not home. Appellant said he would be back. (R.T. p. 29.) Castro placed appellant's vacuum cleaner on appellant's patio, but he never went to appellant's apartment. (R.T. p. 29.)

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1 In accordance with standard appellate practice, the facts are stated in a light most favorable to respondent. (Bones v. Fusco (1937) 21 Cal.App.2d 474, 479.)

When Rebecca Knox returned home around 6:00 or 7:00 p.m., Castro and Chris Knox told her about an incident with appellant who said his cell phone had been stolen from his patio. (R.T. p. 69.) A little later, appellant returned. Castro testified appellant asked Castro where appellant's cell phone was. Castro said he did not know. (R.T. p. 30.) Rebecca Knox testified appellant came into the apartment yelling at Castro, accusing him of stealing appellant's vacuum cleaner. (R.T. p. 70.) Castro said appellant said he would be back. According to Castro, appellant returned with a shotgun and demanded his cell phone. (R.T. p. 30.)

Appellant demanded his cell phone while Castro attempted to call the police on a cordless house phone in the apartment. (R.T. pp. 32, 72.) Appellant grabbed the cordless phone from Castro and pushed him against the wall, using the barrel of the shotgun against Castro's neck. (R.T. pp. 30. 33, 73.) Rebecca Knox thought appellant was going to shoot Castro. (R.T. p. 74.) Appellant told Castro to go ahead and call the cops, then appellant would return and kill Castro. (R.T. p. 33.)

Christopher Knox had been in the bedroom watching television and drinking beer. He came out with a baseball bat and told appellant to get out. (R.T. p. 33.) Appellant said he would return and kill them all. He said he had money and machetes, and could do whatever he wanted. (R.T.

appellant held to Castro's neck. (R.T. p. 99.) Bloomfield also identified the shotgun as the one appellant carried. (R.T. p. 115.)

When appellant was arrested he said, "I said don't fuck with me to the people period," and " I said leave me alone to four or five people who were talking crazy period." Appellant said, "they were the same people that took my cell phone." (R.T. p. 153.) He said all the police had him on was littering. (R.T. p. 153.) He also made the statements: "that bitch know she stole that phone and them checks," and "I'm mad because I had to get rid of my strap." (R.T. p. 163.)

Over defense objection, Deborah Teich, the manager of Bella Vista apartments, testified that after appellant failed to return to his apartment, she cleaned the apartment and re-rented the unit. (R.T. p. 182.) In mid-October 2004 after appellant did not return, Teich initiated eviction and lockout procedures. (R.T. p. 183.) When she went into the apartment to remove appellant's property, Teich found two shotguns in the closet: a .22 caliber Winchester rifle, and a .20 caliber Stevens rifle. (R.T. p. 184.)

The parties stipulated appellant had been convicted of a felony before September 12, 2004. (R.T. pp. 207-208.)

B. Defense Evidence.

Appellant testified that on September 14, 2004, he was employed as an automation general welder, and also did part-time landscape work on weekends. (R.T. pp. 210-211, 216.) He lived in the Bella Vista apartments where he had lived for about 16 or 17 months. (R.T. p. 211.) He had three sons and two daughters. The daughters lived with appellant on weekends. (R.T. p. 210.)

In September 2004, appellant had known the Knoxes for about a year. The Knoxes' son played with his daughters. (R.T. p. 212.) Appellant also lent Rebecca Knox money, gave her rides and let her sit in his house. (R.T. pp. 212-213.) Chris Knox was friendly at first, but appellant grew angry with Chris Knox over time. (R.T. p. 213.) A few months before September 2004, Chris Knox threatened appellant with a bat after appellant confronted Rebecca Knox about putting a "bogus" check into appellant's account. (R.T. pp. 214-215.) Chris Knox flew off the handle and threatened to hit appellant with a bat. (R.T. p. 215.)

On September 12, 2004, appellant worked a side landscaping job. (R.T. p. 215.) He left home around 5:00 or 5:30 p.m. and returned around 10:00 or 10:30 p.m. Before leaving, he saw Castro and Chris Knox. He did not know Castro and was not speaking with Knox. (R.T. p. 216.)

When appellant left, he left his windows open because it was over 100 degrees. (R.T. pp. 217, 233.) When he returned home, he found his daughter's bike was missing and someone had pried open the screen on his window. Some of his daughter's clothes were missing along with his cell phone and some checks. (R.T. p. 218.) Appellant was upset. He asked his neighbors in apartment number two if they saw anyone. (R.T. p. 218.) He saw Castro, Rebecca Knox and some others on the balcony of the Knox apartment looking down at him. (R.T. p. 219.) He asked them if they saw anyone and they got "smart" with appellant. He went inside his apartment to cool down. (R.T. p. 219.)

Appellant returned upstairs to the Knoxes' apartment to retrieve his property. (R.T. p. 220.) They had taken property in the past. When items were missing in the apartment complex, they were the first to contact. (R.T. p. 220.) The Knoxes' prior roommates took things from appellant's balcony and out of his home. (R.T. p. 235.) Castro told appellant Rebecca Knox would be back in about 15 minutes. (R.T. p. 221.) Appellant returned again. Other people were on the Knoxes' balcony yelling at appellant. (R.T. pp. 221-222.) Appellant got his shotgun, which he obtained about six months earlier after being jumped at the complex. He had required 16 stitches. (R.T. p. 222.) Appellant was afraid of Chris Knox because of the bat and Chris' threats. (R.T. p. 223.)

Rebecca Knox told appellant he could come up and look for his property. (R.T. p. 223.) Appellant did not go inside though because Chris Knox came out with a bat. (R.T. p. 223.) Appellant said he would get back to them and call the police. (R.T. p. 224.) Appellant denied hitting Castro, and denied pointing a gun at Castro. Appellant kept the gun at his side the whole time. (R.T. p. 224.) The only contact appellant had with Castro was to ask him if he had appellant's phone. (R.T. p. 225.)

Appellant went downstairs and to his car. Meanwhile, Chris Knox was yelling threats at appellant. (R.T. p. 226.) Appellant was angry. He laid the gun on the floor of his blue Toyota truck. Then he drove toward the freeway to head west. (R.T. p. 227.) He planned to go to his mother's home. (R.T. p. 256.) When he saw the police following him, he threw the gun out the window because he was afraid of getting shot. (R.T. p. 227.)

On cross-examination, appellant admitted he was a felon and was not supposed to have a firearm, but he did have a rifle and two shotguns on September 12, 2004, which he usually kept locked in his closet. (R.T. pp. 228-230.) He had the guns because there was a lot of gang activity in the area. (R.T. p. 231.) He did not know that the short-barrel shotgun was illegal. (R.T. p. 232.)

ARGUMENT

I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO CROSS-EXAMINE REBECCA KNOX REGARDING HER PRIOR DOMESTIC VIOLENCE ACCUSATIONS AGAINST HER HUSBAND, CHRISTOPHER KNOX, WHICH SHE LATER RECANTED, AND THEREBY VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND TO CROSS-EXAMINE WITNESSES AGAINST HIM.

A. Summary of Argument.

Rebecca Knox was one of the principal prosecution witnesses. Her WITNESS credibility was critical to the prosecution's case. The evidence presented a classic credibility contest between Rebecca Knox and Cruz, on the one hand, and appellant, on the other hand. Appellant sought to introduce evidence that Rebecca Knox made accusations of domestic violence against her husband, Chris Knox, then withdrew the accusations. (R.T. p. 12.) The trial court erred by excluding the evidence. (R.T. p. 13.)

The trial court's error in excluding the evidence violated appellant's federal constitutional rights to present a defense and to confront and cross-examine the witnesses against him. (Chambers v. Mississippi (1973) 410 U.S. 284, 302 [35 L.Ed.2d 297, 93 S.Ct. 1038]; In re Martin (1987) 44 Cal.3d 1, 29; People v. Reynolds (1984) 152 Cal.App.3d 42, 45.)

B. The Right to Present Evidence and to Cross-examine.

[redacted] is grounded in the due process clause of the [redacted] Amendment and the compulsory process or confrontation clauses of the Sixth Amendment. (Crane v. Kentucky (1986) 476 U.S. 683, 690 [90 L.Ed.2d 636, 106 S.Ct. 2142]; In re Martin, supra, 44 Cal.3d at p. 29.) [redacted]. (Chambers v. Mississippi, supra, 410 U.S. at pp. 295-298, 302; Olden v. Kentucky (1988) 488 U.S. 227, 231 [102 L.Ed.2d 513, 109 S.Ct. 480]; United States v. Abel (1984) 469 U.S. 45, 50 [83 L.Ed.2d 450, 105 S.Ct. 465].)

The Sixth Amendment right of confrontation imposes limitations on the trial court's ability to restrict the scope of cross-examination of [redacted]. The law is well established that a defendant has a right under the Sixth Amendment Confrontation Clause to admit evidence showing a motive to make false accusations. (Delaware v. Van Arsdall (1986) 475 U.S. 673, 680-681 [106 S.Ct. 1431, 1435-1436, 89 L.Ed.2d 674] [restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment confrontation clause].)

The Confrontation Clause guarantees the defendant in a criminal prosecution the right of cross-examination, which includes exploration of bias and motive to accuse falsely. (Davis v. Alaska (1974) 415 U.S. 308, 315-316 [94 S.Ct. 1105, 39 L.Ed.2d 347].) A defendant's right to present his theory is a fundamental right, and all of his pertinent evidence should be considered by the trier of fact. (Id., at p. 317.) Evidence Code section 352 must "bow to the due process right of a defendant to present all relevant evidence of significant probative value to his defense." (People v. Reeder (1978) 82 Cal.App.3d 543, 553.) While the admission of evidence pursuant to section 352 is within the discretion of the trial court, "the exercise of such discretion 'should favor the defendant in cases of doubt'" (People v. Burrell-Hart (1987) 192 Cal.App.3d 593, 600.)

C. Legal Standards Impeachment Evidence.

The credibility of a witness is, of course, always in issue. Relevant evidence that supports or attacks credibility is proper. (Evid. Code, §§ 210, 351, 780, 785.) More specifically, a witness' character for honesty or veracity or their opposites is a factor the jury may consider in determining credibility. (Evid. Code, § 780, subd. (e).) Appellant had evidence of Rebecca Knox's dishonesty or untruthfulness in making criminal accusations. Either she had been untruthful in making domestic violence accusations against her husband, or she had been less than truthful in withdrawing them. The fact that the accusations concerned domestic violation, a situation in which false or recanting accusations occur with some frequency,[2] did not remove the matter from the province of the jury, but rather was another factor for the jury to consider in determining the weight of the evidence on Rebecca Knox's credibility.

In 1982, the California Constitution was amended by Proposition 8, which added Article I, section 28, subdivision (d). IN Court It provides in part that: "... relevant evidence shall not be excluded in any criminal proceeding ... STOP Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352 ...." Thus, Evidence Code section 787, which formerly restricted the use of specific instances of conduct to prove character was abrogated by the Truth-in-Evidence provision of the state constitution. (People v. Wheeler (1992) 4 Cal.4th 284, 288; People v. Stern (2003) 111 Cal.App.4th 283, 297, citing People v. Harris (1989) 47 Cal.3d 1047.) Thus, the California Evidence Code now more closely parallels the Federal Rules of Evidence, which expressly permit cross-examination about untruthful acts. (Fed. Rules of Evid., rule 608(b), 28 U.S.C.)

The California Supreme Court approved admission of specific instances of conduct of a witness to impeach credibility. In People v.

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2 See generally, Goolkasian, Confronting Domestic Violence: The Role of Criminal Court Judges, National Institute of Justice, November 1986.)

Harris, supra, the defendant argued the trial court committed error by allowing the prosecutor to admit specific instances of conduct by an informant to demonstrate his reliability. The defendant pointed out that Evidence Code section 787 prevented the admission of specific instances of conduct to prove a witness' character for honesty or veracity or to impeach the witness' credibility. The Attorney General argued that "the statutory limitations on the admission of evidence relevant to a witness's honesty and veracity are no longer applicable in criminal cases, except to the extent that exclusion is ordered pursuant to Evidence Code section 352." (People v. Harris, supra, 47 Cal.3d at pp. 1080-1081.) The Court concluded that section 28, subdivision (d), had repealed Evidence Code sections 786 through 790, when the evidence relates to a witness' conduct, but is offered to attack or support the credibility of a witness. Therefore, the prosecutor properly offered specific instances of the informant's conduct to prove his reliability.

Thus, acts of moral turpitude are admissible for impeachment purposes, *whether or not those acts resulted in a conviction of any type.*

Wheeler noted:

> The voters have expressly removed most statutory restrictions . . .. Hence, they have decreed at the least that in proper cases, nonfelony conduct involving moral turpitude

> should be admissible to impeach a criminal witness.

(People v. Wheeler, supra, 4 Cal.4th at p. 295.)

D. Application to the Instant Case.

Appellant properly sought to impeach Rebecca Knox with her conduct evidencing untruthfulness in the specific context of making criminal accusations. (R.T. p. 12.) Counsel explained:

> MR. GULLEY: Yes, Your Honor. Rebecca Knox will be testifying. Ms. Knox previously filed a report accusing her husband of a domestic violence situation. She then recanted the statements after her husband was arrested. Charges were dropped against him. I think this goes toward her credibility. Unfortunately, I left the file in my office, but I think it was from 2001. Of course, I would like to use that to impeach her in terms of her credibility today and what she said to the police at the time.

(R.T. p. 12.)

The court excluded the evidence, citing "the time it will take to bring it in," and "the trial within a trial that it will most certainly would require." (R.T. p. 13.) The ruling was error. First, the cross-examination was entirely proper. Second, as the court acknowledged the evidence was relevant. (R.T. p. 13.) It was not only relevant to Rebecca Knox's credibility, but also Chris Knox's reputation for violence. Third, the court's justification for excluding the evidence was meritless. It would have taken very little time to question Rebecca Knox about her earlier accusations and recanting.

E. Standard of Review and Prejudice.

The general rule is that this type of error requires reversal if it can be said a result more favorable to appellant would have been obtained absent the error. (See e.g., People v. Watson (1956) 46 Cal.2d 818, 836; People v. Daggett (1990) 225 Cal.App.3d 751, 758.) But because the trial court's exclusion of the above evidence denied appellant his right of confrontation, the judgment of guilt should be reversed unless the error was harmless beyond a reasonable doubt. (Delaware v. Van Arsdall, supra, 475 U.S. at p. 680.) Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (Id. at p. 684; see also People v. Rodriguez (1986) 42 Cal.3d 730, 750-751.)

The trial court's exclusion of impeachment evidence against Rebecca Knox was not harmless beyond a reasonable doubt. The error was prejudicial, furthermore, even under the more likely than not standard of review applicable solely to errors of state law. (People v. Watson, supra, 46 Cal.2d 818.) This was a close case. First, the jury acquitted appellant on Count 1. (People v. Washington (1958) 163 Cal.App.2d 833, 846 [close case when jury refuses to convict on all counts].) Second, resolution turned on the credibility of witnesses and this error tended to bolster a crucial prosecution witnesses. (People v. Briggs (1962) 58 Cal.2d 385, 404; People v. Taylor (1986) 180 Cal.App.3d 622, 626; United States v. Simtob (9th Cir. 1990) 901 F.2d 799, 806.) Third, conflicting inferences could have been drawn from the evidence. (People v. Weatherford (1945) 27 Cal.2d 401, 403.)

Only two percipient witnesses to the events in the Knoxes' apartment testified for the prosecution: Rebecca Knox and Castro. The jury easily could have rejected Castro's testimony. He explained that all the times were "fuzzy" because of his medication. (R.T. p. 48.) He suffered from a mental disorder, which caused him to hear things, hear yelling and believe people were coming to kill him. (R.T. pp. 48, 50.) Castro testified that his mental disorder caused him to believe events just like the ones he described with appellant. (R.T. p. 50.) Thus, it was Rebecca Knox's testimony that carried the day for the prosecution. Still, the record shows the jury did not entirely believe Rebecca Knox's testimony completely even without the impeaching evidence. The jury acquitted appellant of Count 1.

WITNESSES

The case pitted the appellant's credibility against Rebecca Knox's credibility. The rule is that *any* substantial error that tends to bolster or corroborate the prosecution case must be deemed prejudicial on review. (Cf., People v. Babbitt (1988) 45 Cal.3d 660, 689; In re Martin (1987) 44 Cal.3d 1, 51; People v. Bain (1971) 5 Cal.3d 839, 852.)

Based on the foregoing, the exclusion of the defense impeachment evidence was prejudicial and the convictions should be reversed.

II

THE TRIAL COURT ERRED IN GIVING CALJIC NUMBER 2.52, THE STATUTORY FLIGHT INSTRUCTION, OVER DEFENSE OBJECTION THEREBY VIOLATING APPELLANT'S DUE PROCESS RIGHTS.

A. Summary of Argument.

It was error to instruct, over defense objection, with CALJIC number 2.52. Substantial evidence demonstrated that appellant's departure had nothing to do with a consciousness of guilt to the charged offenses. Appellant's life was being threatened by Chris Knox, who was armed with a baseball bat. The 911 tape also revealed that Rebecca Knox threatened to shoot appellant in the face. (C.T. p. 9 ["I'm gonna shoot you in your face, you come up here again"]. [3]) Thus, appellant's departure did not support the consciousness of guilt inference permitted by the instruction. The instruction impermissibly diluted the prosecution's burden of proving the truth of the charges beyond a reasonable doubt, violated due process, and requires reversal of appellant's convictions.

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3 The 911 tape, which was played to the jury, and for which they had a transcript (R.T. pp. 76-77), recorded Rebecca Knox while she spoke with the 911 operator, and argued with appellant, stating, "Yep. You gonna let me have it tonight. I'm gonna shoot you in your face, you come up here again." (C.T. p. 9.)

B. Law Governing Flight Instruction.

The trial court had a duty to instruct correctly. "[E]ven in the absence of a request, the trial court must instruct on the general principles of law governing the case, i.e., those principles relevant to the issues raised . . .." (People v. Flannel (1979) 25 Cal.3d 668, 680-681.) Additionally, the trial court had a duty not only to instruct on all relevant principles of law, but also "to refrain from instruction on principles of law which . . . have the effect of confusing the jury or relieving it from making findings on relevant issues." (People v. Satchell (1971) 6 Cal.3d 28, 33, fn. 10.)

Penal Code section 1127c makes giving a flight instruction mandatory "where evidence of flight is relied upon as tending to show guilt." The section provides:

> In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows:
>
> The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.
>
> No further instruction on the subject need be given.

(Pen. Code, § 1127c [emphasis added].)

Penal Code section 1127c contains two limitations to its application. First, the section requires a flight instruction only "where the evidence of flight is relied upon as tending to show guilt, ..." Second, even when a flight instruction is required, the trial court does not necessarily have to instruct using the wording set forth in section 1127c. Both limitations applied in the instant case. First, there was no evidence that appellant fled in a manner showing consciousness of guilt within the meaning of Penal Code section 1127c. Thus, the flight instruction was improper. Second, even if the instruction was appropriate, the pattern instruction based on section 1127c required modification in appellant's case.

The flight instruction should be given with caution. As the Court of Appeals for the Fifth Circuit noted:

> Analytically, flight is an admission by conduct. E. Cleary McCormick on Evidence § 271, p. 655 (rev. ed. 1972). Its probative value as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. See generally Miller v. United States, 116 U.S.App.D.C. 45, 320 F.2d 767, 770 (1963); 1 J. Wigmore, Evidence

> § 173, p. 632 (3d ed. 1940). The use of evidence of flight has been criticized on the grounds that the second and fourth inferences are not supported by common experience and it is widely acknowledged that evidence of flight or related conduct is "only marginally probative as to the ultimate issue of guilt or innocence."

(United States v. Myers (5th Cir. 1977) 550 F.2d 1036, 1049, citing United States v. Robinson (1973) 475 F.2d 376, 384; Wong Sun v. United States (1963) 371 U.S. 471, 483-484, fn. 10, [83 S. Ct. 407, 415-416, 9 L. Ed. 2d 441, 452-453]; United States v. Craig (6th Cir. 1975) 522 F.2d 29, 30.)

C. Application to the Instant Case.

1. Defense Objection to Pattern Flight Instruction

Defense counsel objected to the court's instructing with CALJIC Number 2.52. Counsel argued, "I don't think what happened was sufficient with flight." (R.T. p. 273.) The court overruled the objection and gave the instruction. (R.T. p. 273.)

2. There Was No Flight That Indicated Consciousness of Guilt.

"Flight" exists where there is evidence that the defendant "departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt." (People v. Bradford (1997) 14 Cal.4th 1005, 1055 [Citations and internal quotation marks omitted]; in First accord People v. Mendoza (2000) 24 Cal.4th 130, 179.) Thus, the flight instruction should be given only where there is evidence of actual flight, which may be properly relied upon as tending to show guilt. (See People v. Green (1980) 27 Cal.3d 1, 36-37; People v. Watson (1977) 75 Cal.App.3d 384, 402-403; People v. Salazar (1980) 108 Cal.App.3d 922, 997-998; People v. Clem (1980) 104 Cal.App. 3d 337, 344; People v. Goldstein (1956) 146 Cal.App.2d 268, 275-276.)

When there is an innocent explanation for a defendant's leaving, the flight instruction is improper. For example, departure from a crime scene with one's only source of transportation is not flight that indicates a consciousness of guilt. (People v. Jackson (1996) 13 Cal.4th 1164, 1226.) Similarly, in People v. Crandell (1988) 46 Cal.3d 833, 869-870, the California Supreme Court held that flight, within the meaning of Penal Code section 1127c, "manifestly" requires "a purpose to avoid being observed or arrested." (Id. at p. 869.)

The Court of Appeals for the Ninth Circuit recently explained that a flight instruction is improper unless the evidence supports each of the four separate inferences: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. (United States v. Reneblanco (9th Cir. 2004) 392 F.3d 382, 395, citing United States v. Silverman (9th Cir. 1988) 861 F.2d 571, 581.) In Reneblanco, the Court also considered the defendant's *lack of flight or evasion* when confronted by law enforcement agents. (Reneblanco, supra, 392 F.3d at p. 396.) Here, appellant also immediately submitted to law enforcement authority and cooperated fully when he was stopped. (R.T. pp. 159, 164.) Evidence supported an inference that appellant left for several reasons, including that his life was being threatened. Where, as here, there was no evidence of actual *flight*, giving of CALJIC No. 2.52 was error. There simply was no substantial evidence to support each of the four inferences prerequisite to giving the flight instruction. (United States v. Reneblanco, supra, 392 F.3d at p. 395.)

3. The pattern instruction required modification and preliminary fact-finding in this case.

Even if *some* flight instruction was appropriate, the pattern instruction required modification in this case. (See e.g., People v. London (1988) 206 Cal.App.3d 896, 904.) Here, because substantial evidence showed an innocent reason for appellant's departure, the court should have modified the pattern instruction, and also instructed the jury it had to make preliminary factual findings before it could infer any consciousness of guilt from appellant's departure. When there is evidence that suggests a reason for flight other than consciousness of guilt, then the court should instruct the jury more specifically that whether or not the evidence shows a consciousness of guilt, and what significance to attach to it, are questions of fact the jury must determine. (People v. Gutierrez (1993) 14 Cal.App.4th 380, 388.)

Additionally, the jury should have be instructed to make preliminary fact-finding before considering flight as consciousness of guilt. Under Crandell, supra, in order to indicate a consciousness of guilt, appellant's reason for leaving had to have been to avoid observation or arrest. For example, the "[m]ere return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt." (People v. Turner (1990) 50 Cal.3d 668, 695.) Whenever this preliminary fact is in question, the defendant has a right to an instruction requiring the jury to determine whether the preliminary fact necessary to establish the relevance of the evidence exists and to disregard the evidence unless the jury finds that the preliminary fact does exist. (Evid. Code, § 403, subd. (c)(1).)

If the jury is permitted to find a consciousness of guilt without making the requisite preliminary factual findings, the prosecution's burden is lessened and there is a danger of jury reliance upon an irrational or unjustified inference in violation of the defendant's Sixth and Fourteenth Amendment rights. Here, a preliminary fact-finding was very important because the jury received evidence appellant's life had been threatened by both Chris and Rebecca Knox. While appellant stated on cross-examination that he left to avoid arrest (R.T. pp. 207-208), there also was substantial, unrefuted evidence showing he left for innocent (safety) reasons. Moreover, to the extent the jury could have inferred from the evidence that appellant left to "cool down"(R.T. p. 219), just as he left the Knoxes' apartment, then his departure was innocent, and indeed should be encouraged by the law, and certainly carried with it no consciousness of guilt.

D. Standard of Review.

The instructional error was of constitutional dimension in that it permitted the jury to infer guilt if it found that appellant fled, thereby lessening the prosecution's burden and violating appellant's rights to trial by jury and due process. Therefore, the standard of review is whether the error was harmless beyond a reasonable doubt. This Court should apply the reversible error standard of Chapman v. California (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. "[B]efore a federal constitutional error can be held harmless, the [reviewing] court must be able to declare a belief that it was harmless beyond a reasonable doubt." (Chapman v. California, supra, 386 U.S. at p. 24.) The burden is on the People "either to prove that there was no injury or to suffer a reversal of [the] erroneously obtained judgment." (Ibid.) Thus, the question is whether there is a reasonable possibility that the error might have contributed to the convictions. (Fahy v. Connecticut (1963) 375 U.S. 85, 86-87 [11 L.Ed.2d 171, 84 S.Ct. 229].)

Appellant notes that in People v. Clem (1980) 104 Cal.App.3d 337, 344, the First District Court of Appeal considered a case where the trial court improperly gave the statutory flight instruction. The Clem opinion applied the Watson standard of whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (Ibid [applying standard set forth in People v. Watson (1956) 46 Cal.2d 818, 836].) Because the instructional error impacted constitutional rights, the proper standard, however, is Chapman.

E. Prejudice.

Under either the Chapman or Watson standards of review, appellant was prejudiced by the statutory flight instruction. The permissible inference of the instruction improperly undermined appellant's presumption of innocence. Appellant's leaving the scene where his life had been threatened by a yelling man armed with a baseball bat, and a yelling woman who threatened to shoot appellant in the face, did not support an inference of guilt. Moreover, the instruction directed the jury's attention to flight. Even though the instruction was permissive, the instruction suggested that flight was one type of evidence of guilt that could "establish guilt."

Based on the foregoing, appellant's convictions on all counts should be reversed.

III

THE COURT ERRED BY DENYING THE DEFENSE REQUEST TO INSTRUCT WITH CALJIC NUMBER 12.50 WHEN THE EVIDENCE WARRANTED SUCH INSTRUCTION, AND THE FAILURE TO INSTRUCT IMPERMISSIBLY REDUCED THE PROSECUTION'S BURDEN OF PROOF AND VIOLATED APPELLANT'S DUE PROCESS AND TRIAL RIGHTS.

A. Summary of Argument.

The defense requested the court to instruct the jury with CALJIC Number 12.50, but the court denied the request and thereby committed reversible error. Appellant presented evidence that he possessed the short-barreled shotgun for self defense in three situations. He had been attacked six months before the charged offenses (R.T. p. 222); there was a lot of gang activity in his neighborhood (R.T. p. 231); and appellant received specific threats from Chris Knox. (See e.g., R.T. p. 40.) The evidence showed the need for protection in the area: the apartment complex had armed security officers on patrol in the complex daily from 6:00 p.m. to 2:00 a.m. (R.T. p. 108.) Appellant had a "constitutional right to have the jury determine every material issue presented by the evidence." (People v. Geiger (1984) 35 Cal.3d 510, 519.) The court's failure to give the requested instruction deprived appellant of his constitutionally protected rights to due process right and to a jury trial. (U.S. Const., Sixth and

Fourteenth Amendments; Cal. Const., art. 1, § 15.) The error requires reversal of Count 3.

B. Defense Request for CALJIC Number 12.50.

In discussions on jury instructions, the defense requested instruction with CALJIC number 12.50:[4]

> MR. GULLEY: Yes, Your Honor. There is some argument that 12.50, use of a firearm by a convicted felon self-defense, may be applicable in light of his testimony.

(R.T. p. 279.) The court considered the instruction and declined to give it:

> THE COURT: Okay. Back on the record. 12.50 entitled "Use of a Firearm by a Convicted Felon Self-Defense" is in the court's view designed and restricted to those situations in which a person finds himself in a situation without any pre-planning, and a firearm is either close at hand or immediately given to him for purposes of self-defense, and he therefore possess [sic] it under those spontaneous circumstances.

---

4 The trial court considered defense counsel's discussion of CALJIC 12.50 to be a request for instruction. (R.T. p. 280.) The court did so in spite of the inexact phrasing of the request, and perhaps in recognition of the overly obsequious manner in which counsel at times present requests to the bench. This Court also should view defense counsel's comments as a request for instruction. However, appellant submits that the evidence in this case also created a sua sponte duty to instruct with CALJIC No. 12.50. (Cf., People v. DeLeon (1992) 10 Cal.App.4th 815, 824 [sua sponte to instruct on self-defense theory presented by evidence when not inconsistent with defense theory of case]; see also People v. Wickersham (1982) 32 Cal.3d 307, 326.)

> In the instant case, the evidence was that the defendant had possessed the firearms for, I think he said, two to three months that they've been in his house, and that's simply – and that he had to unlock a box to get to them, this does not appear to the court to be a situation which 12.50 would be applicable because it was not a spontaneous quick moving situation where he was tossed a gun to defend himself by somebody, which I think is what is required here.
>
> So, Mr. Gulley, I will decline to read 12.50 as requested by the defense and overrule your objection.

(R.T. p. 280.)

C. Law Governing Self-Defense as Affirmative Defense to Penal Code Section 12021.

The law recognizes that a felon does not violate Penal Code section 12021 if the possession of the firearm is for self-defense. CALJIC Number 12.50 is the pattern jury instruction summarizing the law. It provides:

> A person previously convicted of a felony does not violate § 12021 of the Penal Code by being in possession of a firearm if:
>
> 1. [He] [She] as a reasonable person had grounds for believing and did believe that [he] [she] was [or] [others were] in imminent peril of great bodily harm; and
>
> 2. Without preconceived design on [his] [her] part, a firearm was made available to [him] [her];

> 3. [His] [Her] possession of such firearm was temporary and for a period of time no longer than that in which the necessity or apparent necessity to use it in self-defense continued; and
>
> 4. The use of the firearm was reasonable under the circumstances and was resorted to only if no alternative means of avoiding danger were available.

(CALJIC No. 12.50.)

The controlling law is that a felon is not deprived of the right to self-defense, including self-defense with a firearm, notwithstanding the plain language of Penal Code section 12021. In People v. King (1978) 22 Cal.3d 12, the California Supreme Court rejected the holding in People v. Evans (1974) 40 Cal.App.3d 582, to the extent it was interpreted to mean that a felon may not lawfully possess a firearm under any circumstances, including when exercising a right to self-defense. (Id. at p. 24.) King concluded the Legislature did not intend to preclude a felon from asserting self-defense, and other related defenses, such as defense of habitation. (Id. at pp. 21-24.) The defendant in King was a guest at a party when a violent altercation arose with a group of party crashers. (Id. at pp. 17-18.) As people were pounding on the door and threatening to break down the door, defendant was handed a pistol, which he fired to frighten the would-be intruders. (Id. at pp. 18-19.) The Court concluded that a felon's use of a firearm for self-defense was not proscribed by section 12021. (Id. at p. 25.)

In People v. Mischele (1983) 142 Cal.App.3d 686, the First Appellate District, Division One, reversed the defendant's convictions for second degree murder and possessing a concealable weapon as a felon. The defendant and his wife had been arguing. Mischele knew his wife's tendency toward violence and knew she had a gun in her jacket pocket. He picked up the jacket and removed the gun. Mischele claimed the gun accidentally discharged and the shot killed his wife. (Id. at pp. 688-690.) The Mischele decision found the trial court erred by failing to give appropriate instructions regarding possible self-defense as explained in People v. King, supra. (Mischele, supra, 142 Cal.App.3d at p. 692.)

D. Application of the Law to the Instant Case.

There was substantial evidence appellant possessed firearms for self-defense, but without a preconceived design. Appellant's life had been threatened by Chris Knox before the incident on September 12, 2004. witness Castro, the victim in the charged incident, testified he had heard Chris Knox threaten to kill appellant many times in during June through August 2004. (R.T. pp. 27, 40.) Appellant testified about Chris Knox's threatening appellant with a bat, a deadly weapon, before September 2004.

(R.T. pp. 213-215.) On September 12, 2004, Chris Knox again threatened appellant with a bat. (R.T. pp. 33, 74.) Talvera testified Chris Knox also had threatened her mother, Teich, the apartment manager. (R.T. p. 172.) Additionally, appellant had been attacked at his apartment complex and required 16 stitches as a result. (R.T. p. 222.) Appellant testified there was a lot of gang activity in the neighborhood where he lived. (R.T. p. 231.) Other (prosecution) evidence also tended to prove the need for protection in the area. The apartment complex had armed security officers on patrol in the complex daily from 6:00 p.m. to 2:00 a.m. (R.T. p. 108.) This would hardly be an expense the landlord would undertake if the circumstances did not warrant it.

The fact that appellant possessed the firearm(s) for approximately six months was irrelevant to the court's duty to instruct with CALJIC Number 12.50. There was evidence from multiple sources, including appellant and Jose Castro, that Chris Knox had threatened appellant's life, and did so while Knox himself was armed with a deadly weapon, a bat. The 911 tape itself also established that Rebecca Knox threatened to shoot appellant in the face. (C.T. p. 9.) That situation in appellant's home environment created a peril against which he was permitted to defend himself. While the threats against appellant's life did not present the immediacy of the threats in People v. King or People v. Mischele, both supra, the threats were no less imminent. Substantial evidence showed that on an ongoing basis appellant was in "imminent peril" from Chris Knox. Additionally, he was in peril, and indeed already had been attacked due to the bad neighborhood where he lived. There were gangs in the area and he had suffered an attack requiring 16 stitches.

Further, appellant's six-month possession did not equate to a "preconceived design." (See CALJIC No. 12.50.) The term "preconceived design" is undefined in California law. But the fact that appellant *correctly* anticipated a specific emergency situation did not make his possession part of a preconceived design. The question of whether appellant possessed the firearm(s) for self-defense was a question of fact for the jury, not the judge. (People v. Lemus (1988) 203 Cal.App.3d 470, 475.) In People v. McClindon (1980) 114 Cal.App.3d 336, the Second Appellate District, Division Five, considered and rejected a challenge to a Penal Code section 12021, subdivision (a), conviction. The felon-defendant fired a pistol at two boys who were playing ball in the courtyard of defendant's apartment building and disturbed his sleep. (Id. at pp. 338-339.) The McClindon decision rejected self-defense under the facts, and also noted that the defendant had possessed the firearm for five months. Unlike the present

CONCLUSION

Based on the foregoing, prejudicial error occurred. If this Court finds error based on either Arguments I or II, then the convictions should be reversed. If this Court finds error based on Argument III, then the conviction on Count 3 should be reversed.

Respectfully submitted,

DATED: September 19, 2005

SUSAN K. KEISER
Attorney for appellant

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CERTIFICATE OF APPELLATE COUNSEL
PURSUANT TO RULE 33(B), CALIFORNIA RULES OF COURT

I, SUSAN K. KEISER, appointed counsel for James Cunningham, hereby certify, pursuant to Rule 33(b), California Rules of Court, that I prepared the foregoing Opening Brief on behalf of my client. I calculated the word count for the brief in the word-processing program Corel WordPerfect 11. The word count for the brief is 8,292, including footnotes, but not including the cover or tables. The brief therefore complies with the rule, which limits the word count to 25,500. I certify that I prepared this brief and this is the word count WordPerfect generated for this brief.

Dated: September 19, 2005

SUSAN K. KEISER

case, in McClindon there was absolutely no evidence that the defendant was in need of self-defense. Young boys, aged seven and 10 years, respectively, were playing with a ball at 8:30 p.m. (Id. at p. 339.) Further, McClindon kept the loaded gun on his night stand. (Ibid.) Thus, the five-month long possession in McClindon was just one factor that revealed the self-defense defense to the possession charge did not exist under the facts of that case.

E. Standard of Review and Prejudice.

The error is of federal constitutional magnitude and, at a minimum, reversal is required unless the prosecution can demonstrate the error was harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. 18.) But because a defense was entirely omitted from the jury's consideration, case-specific harmless-error analysis is not required and the error is reversible per se. (United States v. Zuniga (9th Cir. 1993) 6 F.3d 569, 571.)

Even applying the inclination of California courts to review this kind of error under a test determining whether the issue was resolved against the defendant in another context under proper instructions (see, e.g., People v. Lemus, supra, 203 Cal.App.3d at pp. 478-480), the result here would be the same. The issue was never resolved by the jury against appellant in any context. Thus, this is the type of issue where this Court should not try to weigh the evidence relating to the omitted defense theory. The result still would be that the wrong entity, a court, not the jury, would make a fact-finding. (See Carella v. California (1989) 491 U.S. 263 [109 S.Ct. 2419, 105 L.Ed.2d 218], Scalia, J., conc.) Appellant was entitled to have his jury determine whether he had an honest belief that he was in "imminent peril" such that he was justified in defending himself. The jury, not a reviewing court, was in a position to view appellant's demeanor and that of the other witnesses who testified about the threats in the neighborhood. The demeanor of those witnesses, and of appellant, were cental to a credibility determination which is the crux of this issue. Hence, this error is not susceptible to harmless error review. Accordingly, appellant's conviction on Count 3 should be reversed.

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FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF AND RESPONDENT,	FROM SAN DIEGO COUNTY HON. WILLIAM J. MCGRATH, JUDGE
VS.	
JAMES CUNNINGHAM, DEFENDANT AND APPELLANT.	APPEAL NO. D046320 NO. SCE243538
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MARCH 9, 2005

SAN DIEGO, CALIFORNIA

VOL. 0

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO, EAST COUNTY DIVISION

DEPARTMENT 9 BEFORE HON. WILLIAM J. MCGRATH, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF,

VS.

JAMES CUNNINGHAM,

DEFENDANT.

CASE NO. SCE243538

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JANUARY 4, 5, 6, 2005

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SAN DIEGO SUPERIOR COURT

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STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

JAMES CUNNINGHAM

CASE NO. SCE243538

JANUARY 4, 5, 6, 10, 2005
MARCH 9, 2005

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I, IRENE PERKINS, CSR NO. 12727, A CERTIFIED SHORTHAND REPORTER IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, HEREBY CERTIFY THAT I MADE A SHORTHAND RECORD OF THE PROCEEDINGS HAD IN THE WITHIN CASE AND THAT THE FOREGOING TRANSCRIPT IS A FULL, TRUE, AND CORRECT TRANSCRIPTION OF THE PROCEEDINGS IN THIS CASE.

DATED THIS 13TH DAY OF MAY, 2005.

Irene Perkins

IRENE PERKINS, CSR 12727
OFFICIAL COURT REPORTER